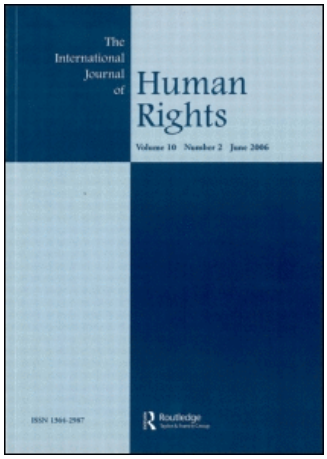

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The protection of refugees and internally displaced persons: Non-Refoulement under customary international law?

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The Protection of Refugees and Internally Displaced Persons: *Non-Refoulement* under Customary International Law?

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ABSTRACT *After decades of inter- and intra-State wars, the United Nations named 20 June 2004 as World Refugee Day with 'A Place to Call Home' as its theme. However, whilst citizens in war-free countries were able to commemorate this significant day in the safety of their homes, for millions of refugees and internally displaced persons who yearn for safety and security, a home is but a distant hope. In the light of the plight of these unfortunate persons, this article will examine whether a state is under a duty, under customary international law and independent of the 1951 Refugees Convention and the 1967 Refugees Protocol, to offer a home – asylum – to refugees and internally displaced persons.*

> 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.'[1]
>
> Universal Declaration of Human Rights, Art.14(1)

> 'Internal displacement is a global crisis that affects from 20 to 25 million people in over 40 countries, in literally all regions of the world.'[2]
>
> Representative of the Secretary-General on Internally Displaced Persons

Introduction

After decades of inter- and intra-State wars, the United Nations named 20 June 2004 as World Refugee Day with 'A Place to Call Home' as its theme. However, whilst citizens in war-free countries were able to commemorate this significant day in the safety of their homes, for millions of refugees and internally displaced persons who yearn for safety and security, a home is but a distant hope.

In the light of the plight of these unfortunate persons, this article will examine whether a state is under a duty under international law to offer a home – asylum – to refugees and

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internally displaced persons. It should be noted that to create rule of customary international law, two requirements must be satisfied, namely State practice, which must be 'both extensive and virtually uniform ... and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved',[3] to be accompanied by *opinio juris*, namely an intention on the part of the relevant States tending to such recognition 'to distinguish legal obligations from non-legal obligations, such as obligations derived from considerations of morality, courtesy or comity'.[4] Whilst 'both [the United Nations High Commissioner for Refugees (UCHCR)] and the [United Nations] General Assembly went even further in assessing that, in many instances, the internally displaced are present alongside refugees ... in situations where it is neither reasonable nor feasible to treat the categories differently in responding to their needs for assistance and protection',[5] the two groups will be discussed separately for contrast and clarity.

Refugees

The 1951 Refugees Convention and the Principle of *Non-Refoulement*

The 1951 Convention relating to the Status of Refugees[6] (Refugees Convention) is the cornerstone of any analysis of international refugee law and asylum will be granted only to a refugee so defined in accordance therewith. Under Article 1A(2) of the Refugees Convention, as amended by Article 1(2) of the 1967 Protocol relating to the Status of Refugees[7] (Refugees Protocol), a refugee is one who,

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.[8]

The Refugees Convention being a multilateral treaty, the crucial issue to the purpose of this article is whether the principle of *non-refoulement*, as enshrined in Article 33 thereof and upon which the whole thrust of international refugees law rests, is binding upon non-party States as a rule of customary international law. It provides that '[N]o Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'[9]

State Practice

Generality of Practice. As of 1 February 2004, 145 states are parties to either the Refugees Convention or the Refugees Protocol, or both. This significant number demonstrates a general consensus within the international community that the principle of *non-refoulement* in Article 33 has acquired the status of a rule of customary international law as it is widely recognised that 'the multilateral treaty-making process is legislative in objective but contractual in method'.[10] Moreover, Article 33 is a provision to which

reservations cannot be made; under Article 42(1) of the Refugees Convention, 'any State may make reservations to Articles of the Convention other than Articles 1, 3, 4, 16(1), 33, 36–46 inclusive'.[11] The Refugees Protocol also contains a similar limitation.[12] Robinson elucidates that:

> Following the example of the 1933 and 1938 Conventions and the recent United Nations practice, Article 42 divides the articles of the Convention into such parts to which reservations by States are permissible and such which have to be accepted as they stand or no adherence to the Convention may take place at all. This is the result of the contention that several of the provisions are so fundamental that, if they are not accepted by a state, the Convention could not fulfil its purpose.[13]

Consistency of Practice. The principle of *non-refoulement* has further been broadened by a significant number of other important multilateral treaties as well as United Nations declarations and resolutions. For instance, the 1967 Declaration on Territorial Asylum, unanimously adopted by the General Assembly,[14] states that '[n]o one [entitled to asylum] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution'.[15] Similarly, the fourth Geneva Convention on the Law of War[16] provides that '[p]rotected persons shall not be transferred to a Power *which is not a party to the Convention . . . In no circumstances* shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs'.[17]

At the regional level, regard is had to the 1984 Cartagena Declaration on Refugees,[18] which Kourula observes as '[reiterating the principle of *non-refoulement*'s] importance and meaning, including the prohibition of rejection at the frontiers, as a corner-stone of the international protection of refugees, and [noting] that the principle is imperative in regard to refugees and should be acknowledged and observed as a rule of *jus cogens*'.[19] It is paramount that this Declaration is now most authoritative on this matter among Central American countries.[20] In addition, the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa[21] proclaims that '[n]o person shall be subjected to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened'.[22] As to Asia, the 1966 Principles Concerning Treatment of Refugees[23] propounded by the Asian–African Legal Consultative Committee observe too the international consensus surrounding the principle of *non-refoutement* by providing an analogous provision.[24] Regarding Europe, where the two World Wars originated, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)[25] obtains and will now be looked into by reference to Article 3 thereof (which concerns torture) since '[p]rotection against *refoulement* is . . . closely related to protection against torture and inhuman or degrading treatment',[26] to examine whether the principle of *non-refoulement* has emerged as a rule of customary international law. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[27] (Torture Convention) and the International Covenant on Civil and Political Rights[28] (ICCPR) will also be discussed as a matter of course.

Relevancy of Prohibition Against Torture. In this analysis, the European Convention should be preferred to both the Torture Convention[29] and the ICCPR as the respective responsible supervisory organs for the latter two treaties, namely the Convention against Torture Committee and the Human Rights Committee, do not possess legal authority to enforce their views which thus only have moral force upon the States Parties thereto, whilst judgments of the European Court of Human Rights have legally binding effects upon the 45 Members States of the Council of Europe and their implementation is supervised by the Committee of Ministers.[30] It is worth noting, nevertheless, that State practice (which is essential to creating a rule of customary international law) demonstrates consistent compliance with the Views of the Convention against Torture Committee[31] and that 'a Special Rapporteur was appointed, in 1990, and a procedure created to follow up the views of the Human Rights Committee'.[32]

Article 3 of the European Convention provides that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[33] This prohibition is absolute in nature, as indicated by the European Court of Human Rights in *Ireland* v. *United Kingdom*[34] that 'the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct';[35] and in *Soering* v. *United Kingdom*[36] that 'Article 3 makes no provision for exception and no derogation from it is permissible under Article 15 in time of war or other national emergency'.[37] The relevancy of this provision vis-à-vis the principle of *non-refoulement* lies with the precept that State responsibility will be incurred on the part of the State from which asylum is requested but which nevertheless denies asylum in violation of *non-refoulement* 'where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in his or her home country'.[38] Lambert argues that 'by reaching far beyond the limits of its own decisions and jurisdiction, the work of the Strasbourg organs on *non-refoulement* is of a norm-creating character'.[39]

Concluding Remarks on State Practice. The general consensus on the importance of the principle of *non-refoulement* at both global and regional levels, the enormity both qualitatively and quantitatively of resolutions and declarations in support of *non-refoulement*, and the absolute prohibition against torture as a rule of *jus cogens* confirm that *non-refoulement* has acquired status as a rule of customary international law by virtue of the relevant State practice, which is itself extensive and uniform.

Opinio Juris

> Unless judicial activity is to result in reducing the legal significance of the most potent source of rules of international law, namely the conduct of States, it would appear that the accurate principle on the subject consists in regarding all uniform conduct of Governments (or, in appropriate cases, abstention therefrom) as evidencing the *opinio necessitates juris* except when it is shown that the conduct in question was not accompanied by any such intention.[40]

This authoritative statement by the late Hersch Lauterpacht discerns that *opinio juris* does not necessarily have to be proved separately but can be derived from evidence of State practice itself. Grahl-Madsen observes in relation to the 1954 United Nations Conference

on the Status of Stateless Persons that the principle of *non-refoulement* is 'an expression of a generally accepted principle'.[41] Moreover, there is general consensus amongst legal scholars[42] that *non-refoulement* has now 'become binding as a matter of both treaty and customary law if not also as a so-called peremptory norm or *jus cogens*'.[43] Whilst Hailbronner differs by doubting the existence of extensive and more or less uniform State practice accompanied by *opinio juris*;[44] and in discounting as 'wishful legal thinking'[45] the contention that *non-refoulement* has become a rule of customary international law, he is criticised for '[overlooking] the consensus at the global, regional and national levels in favour of addressing in some way the claims of those persons in one's territory or at one's borders who fear harm in their country of origin as a result of serious disturbances of public order'.[46] Thus, in the light of the importance of the principle of *non-refoulement*, the significant number of States Parties to the Refugees Convention and the Refugees Protocol, the consistency of observance of *non-refoulement* even outside the Refugees Convention regime at both global and national levels, the close correlation between *refoulement* and torture, and, above all, 'elementary considerations of humanity',[47] the necessary *opinio juris* should be found as sufficiently exemplified by reference to such State practice as evidenced above.

Internally Displaced Persons

In accordance with the UNHCR's *Guiding Principles on Internal Displacement*,

> internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.[48]

Given that no international treaty concerns itself with internally displaced persons,[49] it cannot but be true that a State is under no duty under customary international law to grant asylum to these persons despite their severe plight. Although it is the UNHCR which determines who is within its mandate,[50] '[t]he activities of the UNHCR ... must not be confused with state practice'.[51] Asylum simply cannot be granted to any internally displaced persons given the pre-eminence in international law of the principles of territorial sovereignty and non-intervention.[52] As the International Court of Justice reaffirmed in *Nicaragua* v. *United States*,

> The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference ... the Court considers that it is part and parcel of customary international law. As the Court has observed: 'Between independent States, respect for territorial sovereignty is an essential foundation of international relations' (*ICJ Reports* 1949, p.35), and international law requires political integrity also to be respected. ... The existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States.[53]

Notwithstanding and without prejudice to the desirability of a legal regime covering internally displaced persons,[54] the question of whether a State is under a duty under customary international law to grant asylum to these persons must thus be answered in the negative.

Concluding Remarks

Australia on 13 July 2004 announced that holders of an Australian temporary protection visa were to be allowed to apply within Australia – and thus without first returning to their home countries from which they fled in the first place – for ordinary migration visas that would allow for permanent settlement. Whilst this move was laudable, it was but one step towards successful amelioration of the world refugees problem and the international community must continue to observe both in letter and in spirit the principle of *non-refoulement*. As Ambassador Moore, United States Co-ordinator for Refugee Affairs, stated in 1987, '[c]onsidering that the most important element of a refugee's protection was the obligation of *non-refoulement* . . . [t]he threat to a country posed by influxes of economic migrants should not serve as an excuse for refusing asylum'.[55] This analysis, it is hoped, has illustrated that the principle of *non-refoulement* has transformed itself from a treaty provision into a rule of customary international law, if not one of *jus cogens*. As Grahl-Madsen asserts: 'We may, indeed, consider it a principle of civilisation, one of the building blocks of civilised government.'[56] Meanwhile, the alarming phenomenon of internal displacement must be borne in mind and resolved. Whilst '[n]ational authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction',[57] it is common ground that the problem will diminish significantly if full observance of international humanitarian law – especially with respect to civilians – is attained.[58]

Notes

1. Universal Declaration of Human Rights, adopted and proclaimed by United Nations General Assembly Resolution 217A(III) of 10 December 1948, Art.14(1).
2. Statement of the Representative of the Secretary-General on Internally Displaced Persons to the 57th Session of the United Nations Commission on Human Rights (12 April 2001).
3. *North Sea Continental Shelf* (*Federal Republic of Germany* v. *Denmark*; *Federal Republic of Germany* v. *The Netherlands*), Judgment of 20 February 1969, *ICJ Report*, 1969, pp.3, 43.
4. Michael Akehurst, 'Custom as a Source of International Law', *British Year Book of International Law*, Vol.47 (1974–75), p. 1 at p.33.
5. Pirkko Kourula, *Broadening the Edges: Refugee Definition and International Protection Revisited* (The Hague: Martinus Nijhoff Publishers, 1997), p.189.
6. Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under United Nations General Assembly Resolution 429(V) of 14 December 1950 and entered into force: 22 April 1954.
7. Entered into force: 4 October 1967.
8. Refugees Convention, Art.1A(2), as amended by Refugees Protocol, Art.1(2).
9. Refugees Convention, Art.33(1).
10. Ted L. Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', *Harvard International Law Journal*, Vol.26 (1985), p.457 at p.465.
11. Refugees Convention, Art.42(1).
12. Refugees Protocol, Art.VI(1).
13. N. Robinson, *Convention relating to the Status of Refugees: Its History, Contents and Interpretation* (New York: Institute of Jewish Affairs, 1953), p.175.

14. Adopted by United Nations General Assembly Resolution 2312(XXII) of 14 December 1967.
15. Declaration on Territorial Asylum, Art.3(1).
16. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War and entered into force: 21 October 1950.
17. Ibid. Art.45 (emphasis added).
18. Adopted during 19–22 November 1984 by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama.
19. Kourula (note 5) p.276.
20. See, e.g., Legal Resolution of General Assembly of the Organisation of American States of the Situation of Refugees, Repatriated and Displaced Persons in the American Hemisphere, AG/RES.1103 (XXI-0/91) (7 June 1991); as cited in Guy S. Goodwin-Gill, *The Refugee in International Law*, 2nd edn (Oxford: Clarendon Press, 1996), p.21 n.92.
21. Adopted by the Assembly of Heads of State and Government of the Organisation of African Unity at its 6th Ordinary Session and entered into force: 20 June 1974; as excerpted in Jean-Pierre Colombey (ed.), *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons*, Vol.II: *Regional Instruments* (Geneva: Division of International Protection of the Office of the United Nations High Commissioner for Refugees, 1995), pp.3–9.
22. Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, Art.II(3).
23. Adopted by the Asian–African Legal Consultative Committee at its 8th Session in Bangkok in 1966; as excerpted in Colombey (note 2) pp.10–14.
24. Article 3(1) of the 1966 Principles Concerning Treatment of Refugees provides that '[n]o one seeking asylum . . . should . . . be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory'.
25. Convention for the Protection of Human Rights and Fundamental Freedoms ('European Convention') (ETS No.005), opened for signature on 4 November 1950 and entered into force on 3 September 1953. For an account of the theory and practice of the European Convention on Human Rights, see P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd edn (The Hague: Kluwer International, 1998).
26. Helene Lambert, 'Protection Against *Refoulement* from Europe: Human Rights Law Comes to the Rescue', *International and Comparative Law Quarterly*, Vol.48 (1999), p.515 at p.516.
27. Adopted by United Nations General Assembly Resolution 39/46 of 10 December 1984 and entered into force: 26 June 1987.
28. Adopted by United Nations General Assembly Resolution 2200A(XXI) of 16 December 1966 and entered into force: 23 March 1976.
29. In fact, Article 3 of the Torture Convention is based on the principle of *non-refoulement* as enshrined in Article 33 of the Refugees Convention and enriched by the jurisprudence of the European Court of Human Rights; see Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1995), p.376.
30. Lambert (note 26) pp.521–22.
31. Ibid. p.522.
32. Ibid.
33. European Convention, Art.3.
34. (1980) 2 EHRR 25.
35. Ibid. para.163.
36. (1989) 11 EHRR 439.
37. Ibid. para.88.
38. Ibid. para.91.
39. Lambert (note 26) p.544.
40. Hersch Lauterpacht, *The Development of International Law by the International Court: Being a Revised Edition of The Development of International Law by the Permanent Court of Justice (1934)* (London: Stevens, 1958), p.380.
41. Atle Grahl-Madsen, 'The Emergent International Law relating to Refugees: Past – Present – Future', in Peter Macalister-Smith and Gudmundur Alfredsson (eds), *The Land Beyond: Collected Essays on Refugee*

Law and Policy by Atle Grahl-Madsen (The Hague: Martinus Nijhoff Publishers, 2001), pp.180–244 at p.205, quoting the Final Act of the United Nations Conference on the Status of Stateless Persons of 28 September 1954.

42. See Ian Brownlie, *Principles of Public International Law*, 4th edn (Oxford: Clarendon Press, 1990), p.7, where the Jurist states that '[the International Court of Justice] is willing to assume the existence of an *opinio juris* on the basis of . . . a consensus in the literature'. It ought to be noted that opinions of renowned jurists are recognised in Article 38(1)(d) of the Statute of the International Court of Justice as a general source of international law.
43. David Kennedy, 'International Refugee Protection', *Human Rights Quarterly*, Vol.8, 1 (1986), p.1 at pp.60–61.
44. Kay Hailbronner, '*Nonrefoulement* and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?', in David Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1988), pp.123–58 at pp.128–29.
45. Ibid. p.132.
46. James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991), as excerpted in B.S. Chimni (ed.), *International Refugee Law: A Reader* (Thousand Oaks, CA: Sage Publications, 2000), pp.115–17 at p.116.
47. *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States*), Judgment of 27 June 1986, *ICJ Report*, 1986, para.218.
48. Office for the Co-ordination of Humanitarian Affairs, *Guiding Principles on Internal Displacement*, Introduction, para.2.
49. See Ved P. Nanda, 'Comments on: The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced', in Vera Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues* (The Hague: Martinus Nijhoff Publishers, 1996), pp.135–44 at p.136. Although there are a number of United Nations General Assembly resolutions on the subject matter including the most recent one adopted on 20 February 2002 (A/RES/56/164), and a London Declaration propounded by the International Law Association (see International Law Association, 'The London Declaration of International Law Principles on Internally Displaced Persons' (July 2000), *International Journal of Refugee Law*, Vol.12 (2000), p.672), these instruments are as such not binding in international law. See also Kourula (note 5) p.189, where the author quotes the Representative of the Secretary-General on Internally Displaced Persons in his Statement to the 51st Session of the Committee on Human Rights (February–March 1995), that 'both normatively and institutionally, the international response to the problem of internally displaced is significantly constrained, uncertain and inadequate'.
50. See United Nations High Commissioner for Refugees, Executive Committee, 45th Session, EC/SCP/87, 17 August 1994, 'Protection Aspects of UNHCR Activities on Behalf of Internally Displaced Persons', Introduction, para.4; as excerpted in Chimni (note 46) pp.433–39 at p.435, where it is stated that '[b]y recognising that the problems of the internally displaced and of refugees are manifestations of the same phenomenon of coerced displacement, UNHCR has increasingly considered activities on behalf of the internally displaced to be indispensable components of an overall strategy of prevention and solutions'.
51. Hailbronner (note 44) p.130.
52. Nevertheless, as Chimni (note 46) p.392 avers '[s]uch an argument is, however, not to be read as supporting an absolute doctrine of sovereignty. It is not as if sovereignty cannot be trumped in favour of human rights under any circumstance. The problem is "that the invocation of human rights is selective, often a pretext for attaining incompatible ends, and is advocated by powers which author global policies irreconcilable with any conception of human rights" (quoting B. S. Chimni, 'Globalization and Refugee Blues', in Vol. 8 (1995) *Journal of Refugee Studies*, p.298 at p.299)'.
53. *Nicaragua* v. *United States* (note 47) para.202.
54. The Representative of the Secretary-General on Internally Displaced Persons has stated that

> Without prejudicing the issue of whether or not new normative standards are needed, it is generally recognised that even though the existing law appears to be adequate for the needs of internal displacement, a consolidation and evaluation of existing norms would be of value and would provide the basis for filling whatever gaps may exist. Building on the knowledge acquired from the practical experience on the ground, as well as the expertise of scholars with expertise in this area of the law, the proposed project would aim at the development of ideas for normative standards based on principles of existing international instruments. The goal would be to develop a doctrine of protection specifically tailored to the needs of the internally displaced. This requires first a compilation/commentary of the existing

> norms and a further elaboration of the relevant standards . . . and eventually a declaration or other authoritative document.

See UN.Doc.E/CN.4/1994/44, para.28; as quoted in Richard Plender, 'The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced', in Gowlland-Debbas (note 49) pp.125–26. Nevertheless, Kourula argues that there is (note 5) p.191, '[a] danger in attempting to create a more elaborate legal framework for internally displaced, hinging on standard setting, whereby States would . . . accept merely a reiteration of the existing minimum obligations and block progressive standard setting of human rights in general. . . . There was [therefore] consensus to make reference only to the existing rules and norms of international human rights instruments and international humanitarian law pertaining to internally displaced persons'.

55. U.N.Doc.A/AC.96/SR.415, para.16; as quoted in Goodwin-Gill (note 20) p.129.
56. Grahl-Madsen in Macalister-Smith and Alfredsson (note 41) p.206.
57. *Guiding Principles on Internal Displacement* (note 48) Principle 3.
58. See Gowlland-Debbas (note 49) p.127.